No. 160.

Brf. of Wilson & McIlvaine for P. C.

Office Supreme Court U. S.
FILED
JAN 5 1901
JAMES H. McKENNEY,
Clerk.

Filed Jan. 5, 1901.

IN THE Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

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J. L. LOMBARD, E. A. CUMMINGS, W. H. DOBLE ET AL., *Plaintiffs in Error,*
vs.
THE WEST CHICAGO PARK COMMISSIONERS, *Defendants in Error.*

In Error to the Supreme Court of the State of Illinois.

(175075.)

BRIEF AND ARGUMENT OF COUNSEL FOR PLAINTIFFS IN ERROR.

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BARNARD & MILLER PRINT, CHICAGO.

1889

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I.

STATEMENT OF FACTS.

The West Chicago Park Commissioners are a *quasi* public corporation, organized and having authority within the single town of West Chicago, one of seven towns which (together with parts of other towns) comprise the territory of the city of Chicago. The West Chicago Park Commissioners derive their authority under acts of the legislature of Illinois, which are not here in dispute, under which, upon certain conditions, and pursuing certain methods, they were entitled to make improvements by special assessment on boulevard and park property under their jurisdiction. There were several methods

permitted by law, but the one adopted in the present instance provided for an application by the defendants in error to the corporate authorities of said town of West Chicago to cause an assessment for the improvement planned by the Park Commissioners to be levied and confirmed.

On March 28, 1893, the said Board of Park Commissioners having made due application, accompanied by their plans, the town authorities, pursuant thereto, made and adopted an ordinance for improving Douglas boulevard, which was one of the boulevards previously acquired by the said Park Board by eminent domain. Said ordinance set forth in detail the nature of the improvement intended to be made, and proceeded as follows:

> "Section 1. That the improvement of the sixty feet on the outside and on each side of said Douglas boulevard, or Douglas Park boulevard, from the south line of Garfield Park to the west line of Douglas Park, as desired to be made by the West Chicago Park Commissioners, and as shown by the plans, specifications and estimates transmitted by said West Chicago Park Commissioners to the corporate authorities of the town of West Chicago, shall be made, and that the cost thereof, together with the cost of making and collecting the assessment to be made therefor, shall be paid by special assessment upon the contiguous property abutting on said boulevard so to be improved in the manner provided by law and in accordance with such plans, specifications and estimates.
>
> "Section 2. That said special assessment shall be divided into installments, and that the first of said installments shall be 20 per cent. of the total amount of said assessment, and that the deferred installments shall bear interest at the rate of 6 per cent. per annum, as provided by law." (See printed record, page 42; Trans., 87.)

Douglas boulevard, as a whole, is 250 feet wide, but the central 130 feet is to be a lawn, planted with trees and shrubbery, and the cost of this is not included in the

present assessment, which relates to the outer sixty feet of the boulevard on each side.

Pursuant to the said ordinance an assessment was prayed for by petition to the County Court of Cook County, according to the statute hereinafter cited, and, commissioners having been duly appointed, an assessment roll was made and filed, in which certain sums were charged against the property of each of the plaintiffs in error herein, all of which abutted thereon, the details of which are not material in this controversy. The petition prayed the County Court to confirm the said assessment, and notices were duly given, in response to which objections were filed on behalf of the property of these plaintiffs in error.

On July 8, 1893, a judgment in the nature of an order of confirmation was entered in the County Court, pursuant to the said petition, confirming the assessment reported by the commissioners thereunder, the amounts charged to various properties being first largely reduced. It was thereby found that as to the property hereinafter mentioned objections had been filed and continued from time to time, until a final hearing had been had thereon; said order then proceeds as follows:

> "The court, having full jurisdiction, as aforesaid, in the premises, and of the subject-matter, and of all the parties interested in said assessment, further finds that Philip M. Prescott, as the owner of Lots 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, in sub-block 2, in block 1, and of lots 14, 15, 16, 17, 18, 19, 20, 21, of block 2, and lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, in sub-block 2; 22 and 23 in sub-block 2 of block 5 of Prescott's Douglas Park Addition to Chicago, said addition being a subdivision of blocks 1, 2, 5 and 10, in the Circuit Court partition of the east ½ of the north-east ¼, and that part of the east ½ of the south-east ¼ (being north of the center line of Ogden avenue), of section 23, township 39 north, range 13 east of the third principal meridian, has filed objections to the

> confirmation of said special tax or special assessment as against all of the lots herein last above described; and the court being fully advised in the premises, and after the introduction of evidence before the court on the part of said corporate authorities of the town of West Chicago, and also in behalf of said Philip M. Prescott, objector as aforesaid, and after the argument of counsel for the respective parties, overrules said objections in all things except as to the total amount of benefits to be specially taxed or levied upon said several lots so as hereinabove last described." (See Printed Record, p. 63; Trans., p. 331.)

The order thereupon proceeded to find that the said premises were specially benefited to the extent of certain sums specifically fixed in the said judgment, and thereupon, after specific findings as to each of said lots, proceeded:

> "And the court therefore orders that said lot 1, sub-block 2 of block 5, be and the same is hereby specially taxed the said sum of $345.95 as special benefits resulting thereto by reason of said proposed improvements, and that said lots 2, 3, 4, 5, 6, 7, 8, 9 and 10, in said sub-block 2 of block 5, so objected for by the said Philip M. Prescott, be each severally specially taxed the sum of $212.50 as the amount of benefits resulting to each of said lots 2 to 10, inclusive, by reason of said improvement, and that the respective and several amounts so specially taxed against each of said several lots 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 be, and the same is, hereby made a specific lien upon each of said lots last above mentioned for the amounts so severally taxed against each of the same, and that said amounts so specially taxed shall be enforced and collected against said lots 1 to 10, inclusive, in said sub-block 2, respectively, in the manner provided by law." (Printed Record, page 64; Trans., 333.)

Among the lots as to which said findings were specifically made, above referred to, are certain of the lots at present assessed to and owned by the plaintiffs in error following: E. A. Cummings, W. H. Doble and Francis J. Dougherty.

The said order of confirmation proceeded, in precisely

the same form, to sustain the objections of each of the other plaintiffs in error herein (excepting Mr. Lombard, whose property was brought into the assessment roll by agreement, as hereinafter stated), in respect to the *amount* charged against their premises for the said improvement, and found specifically the amount for which said respective premises should be charged, and overruled their other objections, directing, pursuant to the provisions of the ordinance, that the assessment against each lot should be paid in five annual installments.

In the petition for said order of confirmation, upon which the same was founded, it is alleged that the preliminary petition for the making of said improvement, which by law is required to precede the action of the Park Board, prayed that the same should be made for "making and levying a special tax or special assessment *upon the property abutting on said boulevard,* for the purpose of paying the cost of such improvement as proposed."

And in the petition for the levying of the charge, and for its confirmation, which was filed in the name of the Town of West Chicago, on the application and request of the West Chicago Park Commissioners, there was recited as authority for the said proceeding an act of the legislature of Illinois, approved May 2d, 1873, in force July 1st, 1873, entitled:

> "An act in regard to the completion, improvement and management of public parks and boulevards, and to provide a more efficient remedy for the collection of delinquent assessments";

and in the same petition it is alleged that

> "under and by virtue of the said act last cited the corporate authorities of towns, in which any such parks or boulevards were located, were authorized to levy a *special assessment*

or special tax on the contiguous property abutting on said boulevard, for the purpose of paying the cost of improving the same."

Throughout the order of confirmation, in most places in specific terms, the charge provided for upon the abutting premises was described as a "Special tax." In illustration of this we quote from said judgment of confirmation the following:

(Printed Record, page 64; Transcript, 333):

"The court therefore orders that lot ...., block ...., be and the same is hereby *specially taxed* the said sum of ..... dollars, as special benefits resulting thereto by reason of said proposed improvement, and that lots ...., block ...., be each severally *specially taxed* the sum of ..... dollars."

And from page 65 as follows:

"And the court orders that said sum of ..... dollars be and the same is hereby made a specific, valid and binding *special tax* against the property last above described, and here orders that the *special tax* of ..... dollars so levied against said real estate be and remain a just, valid and legal *special tax* against said real estate so objected for."

See also same thing with reference to sundry other properties on said page 65, (Transcript 336); also page 66, (Transcript page 337), from which we also quote the following:

"And that the amounts above mentioned as the proper sums to be *specially taxed* against the several lots, blocks, pieces and parcels of land described in the objections of said objectors, are to remain as the amounts to be *specially taxed* against said lots, blocks, pieces and parcels of real estate described in the several objections filed in this court in this cause, and the *special tax* against the several lots, blocks, pieces and parcels of real estate so found by this court in respect to said several objections of said several objectors, shall be and the same is hereby confirmed in all things."

Also on page 66 of the printed Record, (Transcript page 338), is the following:

> "And the court further finds that the said *special tax* so ordered to be corrected by the court has in fact been made by the said commissioners in proportion, as near as might be, to the benefits resulting to the lots, blocks, pieces and parcels of real estate so specially taxed for the purpose of paying the cost of said proposed improvement of said boulevard, and that each separate lot, block, piece and parcel of land contained and described in said assessment roll as abutting upon said Douglas boulevard, has been in fact so *specially taxed* its just share of the cost of said improvement."

And also the following, upon the same page:

> "And the court further finds that the total sum of benefits so *specially taxed* upon each separate lot, block and parcel of real estate so abutting upon said Douglas boulevard, does not exceed the amount of special benefits so *specially taxed* to each of the said several lots, blocks, pieces and parcels of land, contained in said assessment roll and that all of the proceedings herein are regular and in strict conformity to law."

We quote the foregoing to show that throughout the said proceeding, in the ordinance, petition and order of confirmation, it was assumed and stated that the *entire cost* of said improvement was to be, and was in fact, charged upon the property abutting upon the proposed improvement, and no other, and that no provision was made in the ordinance, and no prayer was made in the petition, for any ascertainment or means of ascertaining the actual benefits which any of the property would receive from the proposed improvement. There is language in the order of confirmation, (Pr. Rec., p. 61; Tr., p. 326), reciting that the commissioners appointed by the court to make the assessment did make such an investigation, but it was not asked in the petition nor provided for in the ordinance, and so, if made, which does not otherwise appear, it was the act of unauthorized persons, done con-

trary to the express requirement of the ordinance that the whole cost was to be charged on the abutting property, whether benefited or not.

Even in the order of confirmation the court will see, as we have quoted above, (Pr. Rec., p. 66; Tr., p. 338), that the special findings as to the benefits derived by these particular parcels are merely:

1. That in distributing the total cost upon all the property the distribution was made *in proportion* to the benefits each lot would receive.

2. That the total amount of benefits derived by all the property would not *exceed* the amount charged upon it.

This last finding would seem to be immaterial, but plainly there was no finding, and no effort to make one, that the abutting property would be benefited the amount of said charge.

One objection we make in this court to the validity of the proceeding is raised by this circumstance, and we mention it in this connection for greater clearness, viz.:

An ordinance of a municipality providing for a charge of the *entire cost* of a proposed improvement on the abutting property, no matter how distributed between the different parcels, is in conflict with the constitution where no provision is made for ascertaining in advance that the total benefits actually derived by the respective parcels of property from the proposed improvement would equal the amount of the charge.

Pursuant to the foregoing ordinance, and the assessment made and confirmed therefor, Douglas boulevard was improved as described in the said ordinance, at a cost of $250,207.20. (See p. 11, Pr. Rec., Tr., p. 15.)

Two years went by, during which the first and second annual installments of this assessment matured, and were paid by most of the property owners. The statute of Illinois provides that when each annual installment matures an application for judgment against the lots or tracts delinquent at a specified time shall be made in the County Court. Upon such application (by the law as it then was) "no defense or objection shall be made or heard which might have been interposed in a proceeding for the making of such assessment or the application for the confirmation thereof." (Hurd's Stat., 1895, p. 283, § 153.)

On the application for judgment of sale against certain delinquent property for the third installment of said assessment, objections were filed and overruled in the lower court, but on appeal the Supreme Court of the state reversed the judgment of the lower court, and held that the said judgment of confirmation entered on the 8th of July, 1893, was *void,* and that the County Court had acted without jurisdiction in confirming the said assessment, by reason of the invalidity of the ordinance for the improvement.

Culver v. *People,* 161 Ill., p. 89.

On the trial of the present case it was admitted that the said ordinance, passed by the said Park Commissioners March 28th, 1893, was the same ordinance which was in question and considered by the Supreme Court of the state in the case of *Culver* v. *People,* 161 Ill., p. 89. (See p. 52 of Pr. Rec., p. 114, Tr.)

It was also admitted on the same hearing that the said boulevard was completed, in its present condition, before the petition in this cause (the new petition hereafter referred to) was filed. (See p. 52, Pr. Rec., p. 114, Tr.)

After the decision in the Culver case the whole of the said proceedings, and the assessment for said improvement levied under said ordinance of March 28, 1893, were by the petitioners, the West Chicago Park Commissioners, dismissed in open court, and abandoned. (See recitals of the petition in the present case, p. 7 of the Pr. Rec., p. 9 of Tr.)

A new ordinance was passed on July 14, 1896, after the work had been done and completed, reciting the former proceedings, the completion of the improvement, the abandonment and dismissal of the prior proceedings, and the failure thereof, and providing as follows:

> "Section 2. That a new special assessment on the property benefited by said improvement, to the amount that the same may be legally assessed for, be levied to pay the cost of said boulevard improvement above specified, and the remainder of such cost be paid by general taxation, viz.: from the general funds of this board, all in accordance with an act of the General Assembly of the State of Illinois, entitled 'An Act to Enable Park Commissioners or Park Authorities to Make Local Improvements and Provide for the Payment Therefor,' approved June 24, and in force July 1, 1895." (See Pr. Rec., 7; Tr., 9.)

A new estimate was made, pursuant to the said ordinance, of the cost of the said improvement, in which it was recited that the same included the cost of the work as already done, and the cost of making and levying the new special assessment provided for in said ordinance, the total being $250,207.20, as above stated. (See Pr. Rec., p. 8; Tr., pp. 11 and 12.)

A new assessment was made, disregarding the old assessment, charging each lot with a particular portion of the said estimate of cost, crediting in another column the amount already paid under the previous proceeding, and carrying out as a charge against the said property the net balance remaining.

Without going into close details as to the amount charged against specific lots of plaintiffs in error, it will answer the present purpose to state that the property of the plaintiff in error J. L. Lombard was assessed in the new roll $3,866; he was credited with $400 previously paid, being the first and second installments ot the prior assessment, and remains charged with $3,466, balance. (See p. 10 Pr. Rec., Tr., p. 14.)

The same property of the plaintiff in error Lombard in the previous proceeding was assessed the sum of $1,000, which assessment was confirmed in said order of July 8, 1893. (See p. 65 of Pr. Rec., p. 336, Tr.)

It will also be observed, as to the said Lombard's property, that it had not been assessed by the commissioners in the original proceeding, although in fact abutting, having been omitted by some error; but was brought into that proceeding and made a part of that roll by *mere consent*, upon condition that, because of its extremely shallow depth, it should not be charged more than $1,000 for the said improvement; and the said agreement was carried into effect in the said judgment of July 8th, 1893. These particulars are found and stated in the record of that judgment. (See Pr. Rec., p. 65; Tr. of Rec., p. 335-336.)

The lots of the plaintiffs in error the heirs and executors of Michael Reilly were assessed in the new proceeding $7,041.56; they were credited with payments of $963.22, and they remain charged in the present roll with a balance of $6,079.34. In the assessment confirmed July 8th, 1893, the same lots were originally assessed at about the same amount as in the present case, but by the judgment in that case said charge was found excessive,

and was materially reduced, and the assessment thereon confirmed at the sum of $2,408.39, (Pr. Rec., p. 66; Tr., p. 337).

The property of plaintiffs in error Lambert Tree and Anna J. Tree is assessed in the present proceeding $3,837.33; $765 is credited as paid, and the property charged with the balance of $3,113.33. In the assessment of 1893 the same property was charged about the same sum, but by the order of confirmation in that case said charge was found to be excessive, and was reduced to $1,912.50, and at that amount confirmed. (Pr. Rec., p. 64; Tr., p. 334.)

These plaintiffs in error, after it had been held by the trial court that the new proceeding was not void because of the invalidity of the original ordinance, the work being completed before this proceeding was begun, pleaded the said judgment as an adjudication, and moved the court below to strike out from their respective assessments all the excess thereof above the amounts adjudicated by said order of confirmation entered July 8, 1893, and read in evidence the said judgment, with the petition and objections. (See objectors' motion on p. 68 of the Pr. Rec., Tr., p. 420.)

Which said motion the court denied, and plaintiffs in error excepted.

In the assignments of error in the Supreme Court of Illinois this was also urged. (See Pr. Rec., p. 72; Tr., p. 427.)

On the trial in the court below the plaintiffs in error objected to the confirmation of the judgment on the ground:

First. That the said assessments, and the new proceed-

ing to confirm the same, were in violation of the 14th amendment to the constitution of the United States, and especially that part of Section 1 thereof which is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Second. That the said assessment, "and this proceeding to confirm the same", were not authorized or justified by any valid ordinance for making the improvement in question and paying the cost thereof by special assessment which was passed or in existence prior to the actual making of the said improvement, and therefore were not authorized by any law of the State of Illinois; and the imposition of the said charge, or any charge for that purpose, would be void, and without due process of law, and therefore contrary to the provisions of the 14th amendment to the constitution of the United States.

Third. That the ordinance for the making of said improvement by special assessment on private property was void, and the said work was done without any valid ordinance; therefore the present assessment was levied to pay for work already done: that the said charge was therefore not authorized by any law, and was in conflict with the guaranties contained in the 14th amendment to the constitution of the United States, in this, that it would take the property of the said objectors without due process of law, and that it would deny to said objectors the equal protection of the law.

Fourth. That the only statute on which the said pro-

ceeding and the said assessment were based was adopted in 1895, after the work for which the said assessment was levied had been completed; the imposition of the said charge, therefore, would be contrary to the provisions of the 14th amendment to the constitution of the United States, and would deprive the said objectors of their property without due process of law, and would deny the said objectors the equal protection of the law.

Fifth. That the statute of 1895, upon which the said assessment and proceeding were based, was in conflict with the provisions of section one of the 14th amendment of the constitution of the United States, and therefore no sufficient authority for the imposition of the charge herein contemplated upon the property of the said objectors.

(See p. 26 of Pr. Rec., pp. 50 and 51 of Tr.)

The said objectors moved to dismiss the entire proceeding for the same reasons, among others; and also moved, as above stated, to strike out all of said assessments in excess of the former adjudication.

(Pr. Rec., p. 28; Tr., pp. 56, 57 and 58.)

Both these motions were denied, and the assessment was confirmed for the full amounts remaining charged against them by the new assessment roll. Upon motion for a new trial the same objections were made, (Pr. Rec., p. 32), and being overruled, judgment was entered against the objectors, who appealed to the Supreme Court of the state, and assigned for error the same objections, among others. (See Pr. Rec., p. 72; Tr., pp. 426, 427.)

The Supreme Court of Illinois affirmed the judgment of the court below, and plaintiffs in error sued out their writ of error from this court, and assigned for error the said judgment of the Supreme Court of Illinois, (which assignments of error are found on p. 86 of the Pr. Rec.; Tr., pp. 453 and 454).

II.

ERRORS RELIED UPON.

1st. The Supreme Court of the state erred in affirming the judgment of confirmation against the property of plaintiffs in error and each of them.

2nd. The County Court of Cook County should have dismissed the petition for confirmation of the said assessment on the motion of plaintiffs in error, on the ground that upon its face the record was insufficient to support the said assessment; and also on the further ground that in view of the evidence before the court the same appeared to be insufficient in law; and the Supreme Court erred in sustaining said refusal, and in holding that the same was correct.

3rd. The court erred in holding that the County Court of Cook County had jurisdiction to confirm the assessment appealed from upon the property of plaintiffs in error, and each of them.

4th. The court erred in holding that the property of plaintiffs in error could lawfully be assessed for the said improvement by the ordinance and proceeding originating after the work was done, the original ordinance for the assessment having been void.

5th. The court, having held that the original ordinance for said improvement passed in March, 1893, was insufficient to support a proceeding to confirm an assessment therefor, erred in holding that said ordinance was sufficient to support such a proceeding after the work was done, based on a new ordinance passed after the completion of the work.

6th. If the court was right in holding that the provision of the ordinance of March, 1893, for the special assessment to pay for said improvement had any validity, then the court erred in denying plaintiffs in error, and each of them, the benefit of the judgment of the June Term, 1893, confirming the assessment then before the court.

7th. The court erred in holding that the new ordinance, passed after the completion of said improvement, was sufficient to justify the proceeding and judgment appealed from. (See end of brf. for additional assignments.)

III.

THE PROPOSITION TO CHARGE THE WHOLE COST OF THIS WORK ON THE ABUTTING PROPERTY WAS HARSH AND OPPRESSIVE.

The description of the work proposed, (found on pp. 43-51 of printed record, and plans there inserted), shows that the boulevard in question is 250 feet in width and nearly two miles in length, and comprises a central lawn, 130 feet in width, planted with trees and shrubs, and adorned with flowers, having a forty foot roadway on each side, one asphalt and one granite macadam, with no connections across the lawn except at street crossings. On each side is a sidewalk space 20 feet in width, the sidewalk proper being of cement, 8 feet wide, and the remaining 12 feet finished as a lawn inside the curb, lined with trees and fitted with costly boulevard lamps.

The whole improvement forms a connection between two parks under control of defendants in error, and differs radically from a mere roadway or passage. It is properly, considering its great width, separating the abutting private properties nearly a block, and its ornamental

character, rather an extension of the parks than a drive between them. It is in character and purpose a general public improvement, which confers benefits on the entire township, but these proceedings were begun to charge the entire cost, $250,000, on a narrow ribbon of property on each side, substantially 125 feet in depth.

It is as gross an injustice to attempt to charge the cost of a great general improvement like this on the immediately abutting property as it would be to charge them with the purchase or improvement of the park itself, of which this boulevard is essentially a part. The property owners as a whole have resented it, and resisted from the beginning, and plaintiffs in error, who are sought to be charged with $18,000 of it, are here complaining that it is not merely technically without legal authority, but also arbitrary and oppressive. For a number of reasons we contend that the decision of the courts of Illinois he complained of cannot prevail in this court, and in support of this position submit below our points and authorities.

IV.

BRIEF OF THE ARGUMENT, AND POINTS.

1. The improvement, the cost of which is sought to be charged upon the property of plaintiffs in error, was made in pursuance of an ordinance of the town authorities of West Chicago, on the application of the defendants in error, passed March 28th, 1893, and had no other authority. That ordinance by its terms required the entire cost of the improvement to be charged upon the abutting property. This is in conflict with the constitution of the United States, and the whole proceeding should

have been dismissed on the motion of plaintiffs in error.

Norwood v. *Baker,* 172 U. S., 269.
Lyon v. *Town of Tonawanda,* 98 Fed. Rep., 361.

2. By the law of Illinois no valid assessment can be levied upon private property for the cost of an improvement unless the work is preceded by a valid ordinance providing for a special tax or a special assessment to charge the property.

East St. Louis v. *Albrecht,* 150 Ill., 506.
Weld v. *People,* 149 Ill., 258.
City of Carlisle v. *County of Clinton,* 140 Ill., 512.

See also the opinion of the Supreme Court of Illinois in the present case, Pr. Rec., p. 77.

3. The constitution of Illinois, article 9, sec. 9, is as follows:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power *to make* local improvements by special assessment, or by special taxation of contiguous property, or otherwise."

4. The statute of Illinois, chap. 24, art. 9, sec. 1 is as follows:

> "The corporate authorities of cities and villages are hereby vested with power *to make* local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation or otherwise, as they shall by ordinance prescribe."

5. In the constitution of Illinois, and in the local improvement act above mentioned, the modes of charging private property by special assessment and by *special tax upon contiguous property* are entirely distinct.

Kuehner v. *City of Freeport,* 143 Ill., 92.

6. The ordinance of March 28th, 1893, which by its terms charged the whole cost of the improvement on the abutting property, does not provide for a special assessment, but specifically for a special tax on abutting property.

Special taxes, as distinguished from special assessments, are charged only upon the abutting property. Special assessments, as an independent mode, are charged upon all property found by commissioners to be specifically benefited by the proposed improvement, wherever situated. The ordinance in question, therefore, provided not for a special assessment, but for a special tax.

Hurd's Stat. Ills., 1899, Ch. 24, Art. 9, § 24.

Benefits, therefore, as the limit of charge to parcels of land, were disregarded; and this was the fatal element of the ordinance in *Norwood* v. *Baker, supra.*

7. The ordinance of March 28th, 1893, which was the only ordinance preceding the making of the present improvement, was wholly void as to its provision for any special assessment or special tax.

Culver v. *The People,* 161 Ill., 89.
Farrell v. *Town West Chicago,* 162 Ill., 280.
White v. *Town West Chicago,* 164 Ill., 196.
People v. *Eggers,* 164 Ill., 515.
Steenberg v. *The People,* 164 Ill., 478.
People v. *Lingle,* 165 Ill., 65.
People v. *Markley,* 166 Ill., 51.
O'Neil v. *People,* 166 Ill., 565.
Walker v. *People,* 169 Ill., 474.

8. If construed not to be wholly void, then a petition based upon it, addressed to the County Court, praying

the levy of a special assessment, would confer jurisdiction on the County Court, and its judgment would not be void.

Davis v. *City of Litchfield,* 155 Ill., 392.
Mulford v. *Stalzenback,* 46 Ill., 307.
Galena & C. U. R. R. Co. v. *Pound,* 22 Ill., 414.
Harvey v. *Tyler,* 2 Wall. (U. S.), 328.
Van Vleet on Collateral Attack, 82.

9. When the trial court in Illinois, and the Supreme Court of that state, determined that the ordinance of March 28th, 1893, was void, but nevertheless that it formed a sufficient basis for a special assessment or special tax for work previously completed, it imposed upon the owners of property a charge without due process of law.

C., B. & Q. R. R. Co. v. *Chicago,* 166 U. S., 226.
Backus v. *Fort Street U. D. Co.,* 169 U. S., 559.
Castillo v. *McConnico,* 168 U. S., 674.
Williams v. *Mississippi,* 170 U. S., 213, 224.
Neal v. *Delaware,* 103 U. S., 370, 394.
Ex parte Virginia, 100 U. S., 339, 347.
Henderson v. *Mayor of N. Y.,* 92 U. S., 259, 268.
Guthrie on 14th Amendment, p. 45.

10. The Act of the legislature of Illinois passed June 24th, 1895, assuming to confer authority to pass a new ordinance for a special assessment, after the work had been done, so as to charge the cost of it on private property, is in conflict with the constitution of the United States.

City of St. Louis v. *Clemens,* 52 Mo., 133.
Brady v. *King,* 53 Cal., 44.

Cooley on Taxation, 1st Ed., p. 227.
Cooley on Const. Lim., 2d Ed. (bottom page), 407, 420, 421.
Spencer v. *Merchant*, 125 U. S., 351.
New Orleans v. *Clark*, 95 U. S., 655.

V.

THE STATUTES OF ILLINOIS APPLICABLE HERE.

The statute under which the Park Commissioners originally levied the special assessment in question was approved May 2nd, 1873, and in force July 1st, 1873: from section 3 we quote as follows:

> "In case such Board of Park Commissioners shall desire to improve any boulevard or pleasure way under their control, or any part thereof, * * * they shall make plans and specifications for such contemplated improvement. * * * Such corporate authorities" (meaning the corporate authorities of the township in which the park commissioners have their jurisdiction) "may, upon the receipt of such plans, specifications and estimates, at their next meeting * * * determine by ordinance, to be entered upon the records of such town, whether such improvement shall be made or not; if they shall determine to make the same, they shall also prescribe that the same shall be made by special assessment or special taxation of contiguous property. * * * If such ordinance shall provide that such improvement shall be wholly or in part made by special assessment, they shall direct the supervisor of such town to file a petition in the name of the town, in the County Court of his county, for proceedings to assess the cost of such improvement; such petition shall recite the ordinance for the proposed improvement, and the plans, specifications and estimates of the cost thereof, and pray that the cost thereof may be assessed in the manner prescribed by law. The proceedings to levy and collect such assessment subsequent to the filing of such petition shall in all things, as near as may be, conform to the provisions of Article 9 of an act of the General Assembly of this state, entitled an 'Act to provide for the incorporation of cities and villages' * * * and all of the provisions of said article 9, so far as applicable, shall be in force and apply to any assessment made under this act."

Hurd's Ill. Stat., 1899, Chap. 105, p. 1213.

From article 9, referred to in said park statute, we quote as follows:

Section 23:

> "Upon the filing of such petition the court shall appoint three competent persons as commissioners."

Section 24:

> "It shall be the duty of such commissioners * * * to estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city or village and such property, so that each shall bear its relative equitable proportion; and having found said amounts to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement; provided, that no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited."

Hurd's Ill. Stat., 1874, Chap. 24, Art. 9, p. 235.

This is the section of the statute which relates to "special assessments," as distinguished from "special taxes." Other sections which we need not quote require the commissioners to make their report to the County Court, and give notice to the parties interested, who may object. Such objections, being then heard, are determined by the court.

When the ordinance provides for a special tax, as distinguished from a special assessment, the statute is as follows:

Section 17:

> "When said ordinance, under which said local improvement shall be ordered, shall provide that such improvement shall be made by special taxation of contiguous property, the same shall be levied, assessed and collected in the way provided in the section of this act providing for the mode of making, levying, assessing and collecting special assessments."

Hurd's Ill. Stat., 1874, Chap. 24, Art. 9, p. 234.

Subsequent changes were made in this section, but such was the law in 1893 and up to 1895.

Section 39:

> "Upon the application for judgment upon such assessment, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment, or the application for the confirmation thereof."

Section 40:

> "When said general officer (who receives the report of delinquency) shall receive the report provided for in the preceding section, he shall at once proceed to obtain judgment against said lots, parcels of land and property for said special assessments due and unpaid, * * * and shall in the same manner proceed to sell the same for the said special assessments," etc., etc.

The only provision of the state constitution on the subject is quoted under heading IV, and need not be here repeated.

VI.

THE ORIGINAL ORDINANCE OF MARCH 28TH, 1893, PROVIDING FOR THE SAID IMPROVEMENT, AND AN ASSESSMENT THEREFOR, WAS VOID.

(a.) *It was void, in the first place, because it assumed to charge the entire cost of the proposed work on the abutting property, without reference to benefits.*

On this point the important provision of the ordinance is as follows:

> "Section 1. That the improvement of the sixty feet on the outside and on each side of said Douglas boulevard * * * (which was the improvement described in the specifications in the ordinance) shall be made, and that *the cost thereof*, together with the cost of making and collecting the assessment to be made therefor, shall be paid by special assessment upon the *contiguous property abutting on said boulevard.*" (See p. 42 Pr. Rec.; p. 87 of Tr.)

No other provision is contained in the ordinance for the payment of any part of the cost of said improvement, nor does it provide for any inquiry into the question whether the abutting parcels will be benefited so much. We suppose this language to be the precise equivalent of a statement,—more full, but not more definite,—that the *whole* cost of the work shall be paid by the abutting property. The language of the ordinance that it shall be paid "by special assessment upon the abutting property" means nothing more than that, in distributing the amount upon the respective parcels of abutting property, the *apportionment* shall be by special assessment; that is to say, distributed among the several parcels *in proportion to* the benefits derived. The commissioners who are to make the roll are permitted no discretion either to leave any part of the cost unassessed or to go outside the "contiguous property abutting on the boulevard." It has been contended that the words "by special assessment" in the ordinance imply, of themselves, that no lot shall be charged more than it is specially benefited, and that all excess, if any, shall be provided for in some other way, presumptively by general tax. This, we think, is a plain error, as applied to the present case. The words "special assessment" might possibly, if standing alone, be construed to mean "in the manner provided by the special assessment statutes of the State of Illinois," and it might be argued therefrom that the course of procedure would be the same, and when all benefits to private property had been exhausted the excess should be provided for by general tax.

We submit that this would be a strain upon the language, more than it is justly capable of; but in the present case the words "special assessment" are expressly

limited by the words immediately following, "upon the contiguous property abutting on said boulevard."

The statutes of Illinois nowhere provide for a special assessment which shall be only "upon contiguous abutting property"; but if they did, it would not alter the fact that the *whole cost* has here to be laid upon the abutting property.

Under the law of Illinois it is customary to so provide, in levying special taxes, as distinguished from "special assessments," that the distribution among parcels may be made *in proportion to benefits,* and this, we submit, is the only reasonable meaning which can be given the language above mentioned.

The ordinance therefore provides definitely that the entire cost shall be charged upon the abutting property, and makes no reservations with respect to the actual benefits sustained. Such an ordinance is forbidden by the constitution of the United States.

In *Norwood* v. *Baker,* 172 U. S., 269, this doctrine was established in this court. In that case the ordinance before the court provided that:

> "The cost and expense of the condemnation of the property, including the compensation paid to the owners, the cost of the condemnation proceedings, the cost of advertising, and all other costs, and the interest on bonds issued, if any, should be assessed per front foot upon the property bounding and abutting on that part of Ivanhoe avenue as condemned and appropriated herein."

An assessment was made for the cost of said improvement, and charged on the abutting property, in accordance with the said ordinance. In that case this court said, page 278:

> "Undoubtedly abutting owners may be subjected to special assessments, to meet the expense of opening public highways

> in front of the property—such assessments, according to the well established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvement, * * * but the power of the legislature in these matters is not unlimited. * * * As already indicated, the principle underlying special assessments to meet the cost of public improvements, is that the property upon which they are imposed is peculiarly benefited, and, therefore, the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country."

And on page 290 the court said:

> "The corporation" (the village of Norwood) "manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not, to the extent of such cost."

In that case the collection of the entire assessment, as to the complainant in the case, was enjoined, and the judgment affirmed in this court

> "upon the ground that the assessment against the plaintiffs' abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation." (Page 297.)

If this contention is sustained it follows that there was never any valid ordinance for the present assessment. The result would be, as shown under our next head, that the present assessment is, by the settled law of Illinois, illegal.

But if the ordinance be not construed to cast, by its terms, the whole burden on the abutting property, yet

(b) *The State courts held that it was void, and in a collateral proceeding held that an adjudication founded on it was made without jurisdiction, for that sole reason.*

In either case the motion of plaintiffs in error to dismiss the proceeding should have been granted.

That the said ordinance was in fact decided to be *wholly void* we show in our discussion under the VII and VIII heads, next following.

Although it is true that in their opinion in the present case the Illinois Supreme Court *say* that said ordinance was not wholly void, in the same connection the court announces its adherence to the decision in the Culver case, and others, the necessary result of which is as we have argued. The language of that court in the present opinion does not amount, we submit, to a *construction* of the ordinance, for that was settled in the prior cases below cited, which are expressly adhered to. It is rather a plain refusal to apply the local laws to the case of plaintiffs in error, a right in which they are protected by the constitution of the United States.

The law being, when this proceeding was begun, that such an ordinance was *void*, and the court having so decided, the later decision, if in terms to the contrary, would not govern this court.

Thompson v. *Perrine*, 103 U. S., 816.

VII.

BY THE LAW OF ILLINOIS NO ASSESSMENT CAN BE MADE FOR A LOCAL IMPROVEMENT UNLESS WHEN THE WORK IS DONE A VALID ORDINANCE IS IN EXISTENCE REQUIRING THE COST THEREOF TO BE PAID BY SPECIAL ASSESSMENT.

By the constitution and laws of Illinois, and the uniform construction thereof by the Supreme Court, no charge by way of special assessment or special tax can be lawfully made against the property of a citizen for work which has been previously done, unless *preceding the work* there was a valid ordinance therefor, in which provision was made to charge the cost on the private property by special assessment or special tax. From the above proposition, as a statement of the law, there has been no departure in the courts of Illinois.

The constitution of Illinois provides:

> "The General Assembly may vest the corporate authorities of cities, towns and villages with power to *make* local improvements by special assessment," etc. (Art. 9, Sec. 9, Hurd's Stat. 1899, p. 68.)

The language of the first section of article 9 of the city and village act is precisely the same, (Hurd's Stat. Ill., 1899, Ch. 24, p. 362), and the Supreme Court of that state has held that the two are to be construed alike, the statute giving no authority which is not conferred by the provision of the constitution.

Falch v. *People,* 99 Ill., 137.

The first section of the Park Act of July 1, 1895, (Hurd's Stat. Ills., 1899, Ch. 105, p. 1242), provides that:

> "Any Board of Park Commissioners or Park Authorities * * * are hereby vested with power and authority *to levy,* assess and collect *special assessments* * * * *for the purpose of improving any boulevard,*" etc., etc.

All these provisions have been construed to mean the same thing, to wit: that the improvement must *be made* by special assessment: in other words, the special assessment must be provided for by the municipality in some lawful way *before* the improvement is laid down. So the Supreme Court of Illinois has specifically determined in *East St. Louis* v. *Albrecht,* 150 Ill., 506; *Weld* v. *People,* 149 Ill., 258; *City of Carlisle* v. *County of Clinton,* 149 Ill., 512; and as to the Park officers, in *West Chicago Park Commissioners* v. *Sweet,* 167 Ill., 332.

The statutes themselves are express upon this point. Section 18 of Article 9, City and Village Act, (Hurd's St. Ill., 1899, Ch. 24, p. 362), provides:

> "When any such city shall by ordinance provide for the making of any local improvement it shall, *by the same ordinance,* prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both."

The Park Act of 1873, under which the original ordinance was passed, (Hurd's Ill. St., 1899, Ch. 105, p. 1213), provides:

> "Such corporate authorities. (the township officers, on application of the Park Commissioners), may * * * determine by ordinance * * * whether such improvement shall be made or not; if they shall determine to make the same they shall also prescribe that the same shall be made by special assessment, or special taxation of contiguous property."

The Park Act of 1895 contains the identical provision of article 9 of the City and Village Act, above quoted, requiring them to "by the same ordinance prescribe whether the same shall be made by special assessment," etc., etc. (Hurd's Ill. St., 1899, Ch. 105, p. 1242.)

By the constitution and every statute therefore under

which such an assessment can be levied it is made vital that the ordinance which provides for the work shall also provide for the assessment.

The test of the validity of the new assessment therefore is not the continued existence of an ordinance *describing the improvement to be made,* but the continued existence of such an ordinance *coupled with legislation requiring the work to be paid for by special assessment.* This is the plain meaning of the constitution and of the statutes above cited, all of which provide that municipal corporations may *make* local improvements *by* special assessment or special tax on abutting property.

In the opinion filed by the Illinois Supreme Court in the present case the same proposition is stated. We quote therefrom the following:

> "The constitution and the statutes provide for making local improvements by special assessment, and we have uniformly held that they confer no authority to make a local improvement upon some other plan, or without any provision for a special assessment, and afterward provide for payment by such assessment. The improvement *is to be made* by special assessment, and consequently there must be a provision for its payment by that method *when it is made.* The liability to a special assessment must be created by the ordinance which provides for making the improvement, and such a liability is created by a provision of the ordinance that the cost of the improvement shall be paid by special assessment." (See p. 77 Pr. Rec.; pp. 439-440 of Tr.)

The first step therefore to create such a charge in Illinois is the passage of such an ordinance; and if the ordinance of March 28th, 1893, did not contain "a valid provision for a special assessment, or special tax on abutting property" to pay for the said improvement, then the present assessment, and the proceedings therefor, which were admittedly begun after the improvement had been made, are without authority of law.

The next statutory step, (see the statutes cited herein under heading V), is an application to the County Court by petition, reciting the ordinance for the levying of a special assessment or special tax, praying the levy and confirmation of such charge, whereupon commissioners are appointed by the court for that purpose, who make and return an assessment roll. Notices are then given to the owners of property, and, if objections are filed, they come on for trial, and the judgment entered, if the proceeding is sustained, is a judgment of confirmation of such assessment, or a modification thereof. Such was the judgment of July 8, 1893. Where an assessment is lawfully divided into installments the order of confirmation has the effect to confirm it *in toto*, but the installments are payable annually thereafter.

The next statutory step, for the collection of the assessment, if the owner does not pay the installments as they mature, is for the collector whose business it is by law to receive payment to return, under his oath, the particulars of the delinquency to the county collector of the proper county, by a fixed time each year, and thereupon the county collector applies in the County Court for judgment of sale for the amount so matured, at the same time and in the same manner as for the general tax of each year. Upon that application, in case of special assessments or installments thereof, by the express terms of the statute which we have cited above, no questions can be considered which arose prior to the judgment of confirmation. This would beyond question be the law without such statute. The County Court is a court of record, (Hurd's St., 1899, p. §), and its adjudications on these subjects are as conclusive as those of any other court.

The case of *Culver* v. *The People,* 161 Ill., 89, arose, as we have said in our "Statement of Facts," on an appeal from a judgment for the third installment of the said assessment as confirmed by the County Court July 8th, 1893.

It is perfectly evident, as a legal proposition, that if the County Court had jurisdiction to enter the said judgment of *confirmation,* then on the application for judgment of sale on the third installment, in 1895, objections growing out of conditions which preceded the application to confirm, such as defects or insufficiencies in the ordinance, were already foreclosed by that adjudication. The Supreme Court of the state could not have reversed the judgment of sale in the Culver case *on account of defects in the ordinance,* if the County Court had *any jurisdiction whatever* on the application to confirm. This is well settled in the state courts of Illinois.

From the Culver case, (161 Ill., 100), we quote the following:

> "Where, however, the ordinance is void, all the proceedings based upon it, including the judgment of confirmation, must be void also. This necessarily results from the rule that a valid ordinance lies at the basis of every valid assessment. * * * So, here, this ordinance, which authorized an assessment payable in installments, and directs the deferred installments to draw annual interest, is invalid, and consequently the judgment confirming the special assessment for improving Douglas boulevard was not authorized.
>
> "'Where an assessment is claimed to be illegal from the fact that it was based upon an insufficient ordinance, the objection to the ordinance as being insufficient must be made upon the application to confirm the assessment, and if it is not made then, the judgment of confirmation will be regarded as conclusive when called in question collaterally. But we apprehend that the objections to the ordinance, which are waived when not presented upon the application for a confirmation of the assessment, are those which show that the

ordinance is insufficient in the sense of being irregular, or that it is insufficient for some reason which does not establish its invalidity or void character.'" (Page 99.)

In the case of *People* v. *Eggers,* 164 Ill., 515, that court said:

"It is admitted that the objection sustained would have been a good one if made upon the application for confirmation, but it is claimed that it was too late to make it in this proceeding for a judgment of sale. If the judgment of confirmation was not void, but merely erroneous, this would be true, and the only remedy for such a judgment would be by appeal or writ of error; but if the judgment of confirmation was void, it could be resisted at any time or place, and as well upon an application for a judgment of sale as elsewhere. (*Culver* v. *People,* 161 Ill., 89.)" (P. 517.)

In *Steenberg* v. *The People,* 164 Ill., 478, the objection was that the ordinance was defective in not correctly describing the locality of the improvement. We quote from the opinion:

"It being conceded that the objection made would have been a good one if presented on the motion for confirmation of the assessment, the controversy is over the question whether it could be taken advantage of in the collateral proceeding for judgment of sale. That depends on the question whether the County Court had jurisdiction to take any action in the special assessment proceeding. If it had such jurisdiction its judgment against appellant's lots was of binding force, although there may have been some objection to the entry of judgment of confirmation which, if presented, would have been sustained. In such case the objection cannot be raised in a collateral proceeding. * * * On the other hand, if the County Court acted without jurisdiction in entering its judgment of confirmation, that judgment would be void, and could be successfully resisted anywhere." (Citing *Culver* v. *People,* 161 Ill., 89.) (P. 479.)

In the case of *The People* v. *Lingle,* 165 Ill., 65, the court said:

"The judgment of confirmation cannot be thus attacked" (for insufficiency of the ordinance) "except for matters affecting the jurisdiction. The sufficiency of the ordinance is not of

that character, and must be determined on the proceeding to confirm the special assessment." (Citing *Culver* v. *The People. supra.*) (P. 66.)

In *People* v. *Markley,* 166 Ill., 51, the court said:

"Where, upon an application for the confirmation of a special assessment, the court has jurisdiction to render the judgment of confirmation, such judgment will conclude the landowner from questioning any of the proceedings had prior thereto, on a subsequent application for a judgment and order for sale of the premises; but if the proceedings anterior to the judgment confirming the assessment were so defective as not to authorize the court to act at all upon the question of confirmation, then the objection to these proceedings may be made upon an application for judgment and order of sale. * * * The same rule has been declared in *Clark* v. *People,* 146 Ill., 348; *Culver* v. *People,* 161 Ill., 89, and other cases."

In *O'Neil* v. *The People,* 166 Ill., 565, the court said:

"The objections to the ordinance were not made in the confirmation proceeding. In a case such as this the rule is that the ordinance can be attacked on the ground that it is void, but on this ground only; for, if the ordinance is void, the court, in the assessment proceeding, had no jurisdiction, and all the proceedings based upon the ordinance are consequently void. Thus the question of the validity of the ordinance is a jurisdictional one, and may properly be raised in this proceeding." *Culver* v. *The People,* 161 Ill., 89.

In *Walker* v. *The People,* 169 Ill., 474, the court said:

"It is not a defense to an application for judgment on a delinquent list to say that the ordinance was invalid because it failed to state the nature, character, locality and description of the improvement, unless the failure to comply with the requirement of the statute in that regard is such as to render the ordinance absolutely void. * * * Appellants are bound by the adjudication in the special assessment on the particular real estate in the absence of fraud, where there is jurisdiction of the person and subject-matter."

The Culver case has been several times re-affirmed in the Supreme Court of Illinois, and the same ordinance has been held void again and again, in the same respect and

to the same extent,—namely, in so far that the County Court got no jurisdiction thereby to proceed *even to consider* the petition for an assessment, and its judgment thereon was not merely erroneous but *void;* and nothing to the contrary has ever been held in that court.

Cook v. *People,* 161 Ill., 209.
Farrell v. *Town West Chicago,* 162 Ill., 280.
White v. *Town West Chicago,* 164 Ill., 196.

If, then, *any* validity in the provisions of that ordinance would have conferred jurisdiction to consider it, the effect of the Culver case must have been to adjudge it wholly void, whatever other explanation may now be made of it.

VIII.

WHAT, THEN, IS JURISDICTION?

The question of what constitutes jurisdiction might be taken to be settled without citation of authorities. We understand that it consists in the right of a court to *enter at all* upon the consideration of the question presented to it.

Harvey v. *Tyler,* 2 Wall., 328.
Van Vleet on Collateral Attack, 82.
Board of Commissioners v. *Platt,* 79 Fed. Rep., 567.

The question what, as matter of law, constitutes "jurisdiction" we take to be the same everywhere. The decisions of the courts of Illinois, both those above and below cited, are at least explicit on the subject. From them we extract the following proposition:

If the court, on the application to confirm the original assessment, had jurisdiction to *consider* the ordinance in that case, or the power to enter upon the subject at all, then its adjudication was not void. If it had no power to consider the petition in that case, or to determine whether the ordinance was good or bad, then its adjudication was void.

> "They (the authorities) all agree that enough must appear either in the application or the order, or at least somewhere upon the face of the proceeding, to call upon the court to proceed to act; and all agree that when that does appear, then the court had properly acquired jurisdiction, or, in other words, is properly set to work. When the jurisdiction is thus established, and the court is authorized to hear, it follows as necessary consequence that it is authorized to adjudge, and that judgment being thus entered by authority of law, no matter how erroneous it may be, or even absurd—though it be made in palpable violation of the law itself, and manifestly against the evidence—is, nevertheless, binding upon all whom the law says shall be bound by it that is upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment it cannot be inquired into—nor its regularity questioned in any collateral proceeding"

Young v. *Lorain*, 11 Ill., 637.

> "The rule is that enough must appear either in the application or the order, or at least somewhere upon the face of the proceedings, to call upon the court to proceed to act, and when that does appear, then the court has properly acquired jurisdiction."

Mulford v. *Stalzenback*, 46 Ill., 307.

> "When such an application was presented as required him (the judge) to act, then he acquired jurisdiction over the subject. He was then properly set to work. When jurisdiction is once shown to have attached, his authority to act was as complete as is the authority of the Circuit Court in any matter of which it has jurisdiction."

Galena & C. U. R. R. Co. v. *Pound*, 22 Ill., 414.

See, also,

Fitzgibbon v. *Lake*, 29 Ill., 177.

Reid v. *Morton*, 119 Ill., 131.

The foregoing doctrine as to what constitutes jurisdiction, applicable as well in special assessment cases as in others, is established in Illinois, and not disputed. In the present case it is not denied that all the elements of a sufficient petition for a special assessment were contained in that presented to the court in 1893 *except one.* The statute required the petition to "recite the ordinance." It did recite that of March 28th, 1893. If that ordinance *had any validity whatever,* so as to permit the court to enter upon a consideration of petitioner's rights under it, manifestly the order entered thereon would not be void, however erroneous.

Inasmuch as the statutes of Illinois have always authorized the levy of a special assessment in one installment, even in cases where it might, at the option of the municipality, have been divided into many, the provision of Section 1 of the ordinance of March 28th, 1893, would have conferred jurisdiction upon the County Court to consider the petition, *if that section also had not been void.*

Keeler v. *The People,* 160 Ill., 179.

In that case the ordinance did not provide for a division of the assessment into installments, but the judgment separated it into five equal parts, and also made confirmation of the total. This was held the equivalent of a judgment in a single installment; the attempted division being incomplete as not specifying when the installments were payable, and being disregarded. If, in the present case, the provision *for installments only* was void, then there remained a provision in the ordinance for *one* installment, as in the Keeler case. Even more clearly, for in this ordinance the second section only contained the

provision dividing the total into installments, and if, as is now claimed, this was the only defect, section one would have been sufficient to sustain the court's jurisdiction. There was in this case an order confirming the total, as in the Keeler case.

In *Clark* v. *People,* 146 Ill., 350, it was said:

> "It is the general rule that where the court has jurisdiction of the parties and subject-matter in a particular case, its judgment * * * is conclusive, and is not open to collateral impeachment by the parties thereto, or their privies. * * * This rule has been applied by this court to judgments confirming special assessments so frequently that it is unnecessary for us to do more than cite the cases where such application has been made." (Citing eleven cases.)

The result is that the Culver case could not have been so decided if the first section of the ordinance of March 28, 1893, had not been void, as well as the second. By that decision the first section falls with the second.

The necessary effect, therefore, of the decision of the Supreme Court of Illinois in *Culver* v. *The People,* was to wipe out and extinguish every provision of the ordinance of March 28th, 1893, for the levying of *any* special assessment or special tax. If there was anything left of it whatever, as a basis for a charge upon private property, the decision of *Culver* v. *The People* could not have been rendered.

This was the doctrine held by the Illinois Court in *O'Neil* v. *People,* 166 Ill., 565, where the court said, referring to the Culver case:

> "The rule is, that the ordinance can be attacked (on application for judgment) *on the ground it is void, but on this ground only,* for if the ordinance is void the court, in the assessment proceeding, had no jurisdiction, and all the proceedings based upon the ordinance are consequently void. Thus the question of the validity of the ordinance is a jurisdictional one, and may properly be raised in this proceeding."

The Culver case became the law of the State of Illinois, as the consideration of that ordinance was specifically before the court. And so the law stood when this proceeding was begun.

When, therefore, the new assessment against the property of these plaintiffs in error was levied, in 1896, after the work had been completed, under a new ordinance providing for a special assessment, the situation was precisely one which, by the frequent decisions of the Supreme Court of that state, neither created nor permitted any charge against private property.

East St. Louis v. *Albrecht*, 150 Ill., 506.
Weld v. *People*, 149 Ill., 258.

Under those conditions, if the settled and established law of Illinois had been applied to the case of these plaintiffs in error no such charge against their property could have been sustained. The motion of plaintiffs in error to dismiss the proceedings should have been allowed.

IX.

THE ILLINOIS COURTS APPLIED TO PLAINTIFFS IN ERROR AND THEIR PREMISES A RULE THE EFFECT OF WHICH WAS TO CHARGE THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

We are complaining, in the present proceeding, that the law of Illinois *was not applied* to the case of these plaintiffs in error, but that their property is sought to be charged in the present proceeding to this large extent *contrary to law*, and without right, by the constituted authorities of the State of Illinois; and that this contravenes the fourteenth amendment of the constitution of the United States.

It is established in this court that the provisions of the 14th amendment to the constitution are a guaranty, not merely against a *statute* of a state in contravention thereof, but against a misapplication, *by the courts of any state,* of the local laws, although on their face not unjust or unreasonable, so as to produce the same oppressive effect as if done by statute.

As we understand the rule, if the judicial authorities of the state deny any litigant the equal protection of the laws, or by judgments charge him or his property, without due process of law, it is as much the act of the state as if done by the legislature.

C., B. & Q. R. R. Co. v. *City of Chicago,* 166 U. S., 228.

Backus v. *Fort. St. U. D. Co.,* 169 U. S., 559.

Costillo v. *McConnico,* 168 U. S., 674.

Williams v. *Mississippi,* 170 U. S., 213, 224.

Neal v. *Delaware,* 103 U. S., 370, 394.

Exparte Virginia, 100 U. S., 339, 347.

Henderson v. *Mayor of N. Y.,* 92 U. S., 259, 268.

Guthrie on 14th Amend., 45.

The present is a case by which the property of the plaintiffs in error is charged with a large public obligation by a whip-sawing process which can only be defended, if at all, by separating the questions into single propositions and considering each separately, as if independent, and then combining the results; the effect of which, in the present case, is as oppressive as if the rights of plaintiff in error had been denied by statute.

The fundamental law of Illinois, as construed by its courts, denies public corporations any right to levy a

special assessment to pay for a local improvement *after it is made*. This we have shown above, and this proposition, we apprehend, is undisputed.

East St. Louis v. *Albrecht*, 150 Ill., 506.
City of Carlisle v. *County of Clinton*, 140 Ill., 512.
Weld v. *People*, 149 Ill., 258.

The question before the trial court and the Supreme Court of Illinois was, on this point, whether or not the ordinance of March 28, 1893, which was the only prior authority for making the said improvement, contained valid provision for *any* special assessment; it was the contention of the plaintiffs in error that it did not, and, if not, the *whole assessment* was without lawful authority and void.

In the alternative, it was contended by plaintiffs in error that if the said original ordinance *did* contain a valid provision for *any* special assessment, then the County Court, on the application to confirm the assessment made under it, was not without jurisdiction, and its judgment reducing the assessment upon the lands of plaintiffs in error, and confirming it as reduced, upon their objections, was a final adjudication of the amount due from their property for that improvement, and in a subsequent proceeding the court had no power to charge more than that sum to any of the parcels affected.

A prior adjudication reducing an assessment is a bar to an effort to charge the land further for the same improvement.

Greeley v. *Town of Cicero*, 148 Ill., p. 632.

Plaintiffs in error insisted in the courts of Illinois that they were entitled to the benefit of one or the other of these propositions, viz.:

Either the ordinance of March 28, 1893, as to its provision for a special assessment, was *void,* in which case the whole assessment was unlawful; or it was *not* void, in which case the County Court had jurisdiction to entertain the petition under it, and its adjudication was valid. In other words, we should either not be charged at all or only half the present amount.

But the Supreme Court of Illinois decided that said original ordinance was *void,* so that the County Court had no jurisdiction to entertain or consider a petition based upon it, and also that it was *valid,* so as to provide sufficiently for a special assessment, and to justify a new proceeding to charge the property after the work had been done.

In other words, in order to charge the lands of plaintiffs in error, whether or no, it was held that the original ordinance was valid, and also that it was void, a proposition so manifestly unjustifiable as to clearly come short of "due process of law."

If a statute of Illinois had provided that an ordinance for an assessment, in a form like the present, should be deemed void, so as to confer no jurisdiction on a court to consider it, and also should be deemed valid, so as to authorize a subsequent assessment for an improvement already made, it would be perfectly apparent that, however intended, it would operate as a trap to catch a property owner coming or going. Precisely such was the effect of the court's rulings in the present case.

Under this head it is our contention that the judgment

of the Supreme Court of Illinois imposed upon the plaintiffs in error this heavy burden contrary to the provisions of the 14th amendment, in the manner aforesaid.

X.

IF THE ORDINANCE OF MARCH 28TH, 1893, WAS NOT VOID, THEN THE JUDGMENT OF JULY 8TH, 1893, WAS VALID, AND CONCLUSIVE OF THE BENEFITS TO THE PROPERTY IN QUESTION.

If the ordinance of March 28th, 1893, had any validity whatever, as a provision for any special assessment or special tax, the adjudication of the County Court in the proceeding to confirm settled the rights of these plaintiffs in error, and should have been held conclusive in the subsequent proceeding.

In the present case, it having been held that notwithstanding the Culver case the ordinance of March 28th, 1893, contained a sufficient provision for a special assessment to charge the land of plaintiffs in error with a liability for the improvement, we asserted that in such case the County Court was not without jurisdiction in the confirmation proceeding, and its judgment was valid. The County Court had in 1893 reduced the assessment of these plaintiffs in error, and confirmed the same at an amount one-half of the present assessment, or thereabouts. Our motion to strike out from the present assessment roll all the excess over that sum was denied, and this has been sustained on appeal.

The Supreme Court has therefore held that the ordinance was valid enough to charge the property of plaintiffs in error, but not valid enough to confer jurisdiction on the County Court.

The effect of a judgment of a court of record is a question of general law, not peculiar to Illinois, and does not arise on its statutes or constitution. An adjudication of a court of record *having jurisdiction* is binding everywhere, and the question is presented to this court whether the refusal of a state court to respect such an adjudication, the result of which is to charge the property of a litigant for a public improvement, or increase such a charge, is not in contravention of the fourteenth amendment of the constitution of the United States. We contend that it is.

Considering the two questions decided by the state court together, as under our last heading, the federal question is, whether the use of one to head off a defense under the other is not denying a citizen his "due process of law." And, to determine this, the court will not assume that the decision of the two several questions involved was correct, even if, in their nature, both local. Nor, in considering them separately, is there any such presumption where the contention is that the local law was misapplied.

Guthrie, in his work on the 14th Amendment, page 45, says:

> "The rule as to accepting the interpretation of the state court is not universal. It does not strictly apply to the effect and operation of state statutes. The Supreme Court may decline to concur in the view of the state court as to the real effect and operation of a state statute or ordinance, and its necessary tendency."

And he cites on this point:

Soon Hing v. *Crowley,* 113 U. S., 703, 710.
Yick Wo v. *Hopkins,* 118 U. S., 356, 366.
R. R. and Telephone Cos. v. *Board of Equalizers,* 85 Fed. Rep., 302, 317.

The same author, on page 73, says:

"Ordinarily the Supreme Court will not attempt to review and correct the errors of state tribunals in the general administration of the local laws; but if a law or ordinance be systematically administered so as to violate the Fourteenth Amendment the court will interfere;" citing

Henderson v. *Mayor of N. Y.*, 92 U. S., 259, 273.
Chy Lung v. *Freeman*, 92 U. S., 275, 279.
Neal v. *Delaware*, 103 U. S., 370.
Soon Hing v. *Crowley*, 113 U. S., 703, 710.
Arrowsmith v. *Harmoning*, 118 U. S., 194, 196.
Yick Wo v. *Hopkins*, 118 U. S., 356, 373.
Williams v. *Mississippi*, 170 U. S., 213, 225.

These then are, thus far,

THE FEDERAL QUESTIONS.

1. The courts of Illinois, having held that the ordinance of March 28, 1893, *was void*, so as to confer on the County Court no power to consider an assessment levied under it, ought to have held accordingly that the present proceeding was invalid. Their refusal to do so had the effect to charge this property without due process of law.

2. Construing that ordinance as having *any* validity, they should have sustained the prior judgment of the County Court, based upon it, and the refusal to do so denied plaintiffs in error due process of law.

3. To decide the above questions both ways in the same case, and thus sustain this charge against plaintiff's lands, is not due process of law, and amounts to a denial of federal rights.

The first of the questions so involved, viz.: the validity of the ordinance, was originally local, and this court will follow on that point the decisions of the local courts, as they were when the question arose, but will not permit them to refuse a citizen the benefit of the law, thus ascertained.

See *Thompson* v. *Perrine*, 103 U. S., 816,

where this court refused to follow the latest decision of the State Court, departing from its former rulings after the rights of the parties arose.

In *Anderson* v. *Santa Anna*, 116 U. S., 361, on a case where the Supreme Court of Illinois had departed from a line of decisions after the question at issue arose, this court said:

> "If, according to the law of Illinois, as declared by its highest court at the time the bonds in suit were issued, the act of February 28, 1867, was a valid exercise of legislative powers, the rights of purchasers or holders could not be affected by a subsequent change of decision."

The same doctrine was applied to previous statutes as construed by the local courts at the time the right (or conversely the demand) arose in *Douglass* v. *County of Pike*, 101 U. S., 677, cited in the Santa Anna case.

The second and third of said questions are not of local law, or only partially so; but if they were wholly so, this court would still inquire whether the decision on these points was a departure from the rules which prevailed when these proceedings were begun: and also whether they were a fair application to this case of the local laws as usually construed.

The most vital principle in each of these propositions, as federal questions, is the *misapplication* by the state court of its established rules of law, or its departure from

principles theretofore settled, so as to deny the benefits thereof to plaintiffs in error as effectively as if it was done by command of the legislature.

The decision complained of is also in conflict with the first clause of the fourteenth amendment, in that it discriminates against the litigants in this case, and denies them rights which are conceded to litigants in general.

XI.

IF THE PARK ACT OF 1895 IS CONSTRUED TO BEAR UPON THIS CASE AT ALL IT IS IN CONFLICT WITH THE FOURTEENTH AMENDMENT.

The 20th section of the act of Illinois approved June 24th, 1895, in force July 1st, 1895, entitled "An Act to enable Park Commissioners or Park Authorities to make local improvements, and provide for the payment therefor," is the only statutory authority for a new proceeding to be begun and prosecuted after the improvement has been completed.

We quote from the said 20th section the following:

> "Where in any case such park board or park authorities, having authority to improve any street or streets, * * * said improvement shall have been made or partly completed and a special assessment levied therefor shall have been set aside by a court of competent jurisdiction, or the provision in any ordinance for the payment of said improvement by special assessment shall have failed, or been declared void by any court of competent jurisdiction, then, and in any such case, the said Park Commissioners or park authorities are hereby vested with power to levy, assess and collect a new special assessment on property benefited by said improvement, or completed portion thereof, in the same manner as in other cases, and the lots, blocks, tracts or parcels of land found benefited by said improvements, or the completed portion thereof, shall each severally be liable to pay for said benefits to the same extent and in the same proportion as in other cases. Provided, that the provisions and all proceedings in

> respect to such new assessments shall relate to and be in force in all cases in which at the time of the passage of this act work has been completed, or partially completed, under any special assessment proceedings, or attempted special proceedings heretofore levied or collected, or attempted to be levied and collected, by any such Board of Park Commissioners or park authorities." (Hurd's Statutes of Illinois, 1899, Chap. 105, Sec. 20, page 1244.)

It is recited in the petition for the present improvement that the new ordinance, which is the basis of the present proceeding, rests upon the authority of the above section. It is recited also that the previous proceedings had been "declared void by a court of competent jurisdiction," and set aside by order of court. (Pr. Rec., 50, 51.)

Prior to the passage of said act, in 1895, *after said work had been completed,* there was no statute which authorized a new assessment for such an improvement, under these conditions. The "city and village act" then in force contained such a provision, but had no application to parks or park boards, or town authorities. The main ground of the decision in *Culver* v. *The People,* 161 Ill., 89, was that the provision of the city and village act authorizing a division of assessments into installments had no application to assessments by park boards.

Such then was the condition on July 1st, 1895, that a previous proceeding to charge this property for the said improvement had been "declared void"; that the work had been completed; that no law existed under which a new assessment could be made. Thereupon the legislature passed the law in question, assuming to create a right to charge the property of plaintiffs in error for previous work.

The provision of this act of 1895 authorizing an assessment for work previously done was, we submit, contrary

to the fourteenth amendment. We have seen that by the constitution and laws of Illinois property could not be charged except in pursuance of a right which existed *before the work was done.*

It is contended that this act is valid in this respect because the ordinance of March 28th, 1893, "created a liability" against this property for the cost of said improvement, and that the statute, although subsequent, merely provided means for enforcing that obligation. This we submit is not the case, even if it be assumed that the original ordinance contained a valid provision for an assessment. *The liability of the property* is not created by the *mere* existence of the prior ordinance. There must be at the time a statute to make it effective. It is by virtue of the *statute,* and not the ordinance, that the right exists. An ordinance, though purporting to create such a charge, but with no statute to authorize it, and no person or court provided to decree or enforce it, would be altogether ineffectual. No municipal act, done without statutory authority, can impose an obligation or duty.

Marsh v. *Chesnut,* 14 Ill., 223.
Billings v. *Detten,* 15 Ill., 218.
Conway v. *Cable,* 37 Ill., 82.
Anderson v. *Santa Anna,* 116 U. S., 360.

And no such void imposition could be made good afterward, so that a mere remedy provided later could vitalize it *ab initio.* The ordinance is only one step in a series of proceedings which must depend upon statutory authority, and the existence of the ordinance without the statute does not charge property, nor have any effect whatever thereon. Without the new power conferred by this act the Park Board could never have ac-

quired a right to sell the property of plaintiffs in error for this improvement, and this is an essential element of the obligation.

In Missouri a state of facts like the present arose. Proceedings were taken to levy a special assessment. Pursuant to this the work was done, and the contractor, according to the procedure in that state, undertook to collect the money, but the proceedings were found defective. Afterward the legislature, by a new statute, conferred power to make a re-assessment, which was done. In *City of St. Louis* v. *Clemens*, 52 Mo., 133, the validity of the new act was in question, and the court said:

> "The City of St. Louis, under the law as it stood when the contract was made and the work done for which the assessment was made for which this suit is brought, could only authorize the making of improvements of the kind in question so as to charge the adjoining property with the cost thereof by a compliance with the requirements of her charter. This was not done in this case, so that the doing of the work by the contractor created no obligation on the part of the appellant to pay therefor, nor did it create any lien on the property of the appellant to secure the payment of the cost of the work, nor did it create any right in favor of the contractor to demand or recover the same from either the defendant or his property, either in the name of the city for his use or otherwise. * * * Such right or liability was created for the first time by the act of 21st of March, 1870. *How then can we say that this act does not create a new right in favor of the contractor, and incur a new liability on the part of the defendant?*"

The same in substance was held by the Supreme Court of California in *Brady* v. *King*, 53 Cal., 44.

To illustrate the application of this doctrine to the present case,—

The present Park Board had, in 1893, power to charge private property with the cost of local improvements, not *generally*, but by following a de-

fined course, *i. e.,* levying by ordinance an assessment *in a single installment.* They assumed to levy one in a different manner, *i. e., by five installments;* and this was held to be so far beyond their power as to confer no jurisdiction on the County Court to act upon it at all. Their action was, therefore, as ineffectual as if they had assumed a power altogether denied them. When, then, the act of 1895 was passed, and their new ordinance adopted, this was not merely a form of *procedure.* The *effect* of their act altogether depends on it.

That it is the *statute,* and not the ordinance, with no law to enforce it, which creates a charge on private property, is amply established by the decision of the Supreme Court of Illinois in *Weld* v. *People,* 149 Ill., 258, which was a proceeding to levy a special tax on private property for a sidewalk. There had been an adequate ordinance for the work, the only defect of which was that it had not been posted, as required by law. Under it the work was done, and a special tax levied, which failed for that reason. A new ordinance was then passed and duly posted under which a new special tax was levied. This was held to be unauthorized because no valid ordinance existed *when the work was done.*

If the prior ordinance *created the liability,* that assessment ought to have been sustained, for an effort was made in advance to charge the property, which is all that can correctly be said in the present case. If afterwards a law were passed to authorize a levy for that work, manifestly the right to charge the property *would arise at the same time.* Such a statute, like that relied on in the pres-

ent case, would not merely relate to the remedy, but would, if effective at all, inject, *as of the time of its passage,* new validity and life into an inadequate ordinance.

Although the act of 1895 does not in terms purport to *cure* the defects of this proceeding, or any previous proceeding, yet in so far as it authorizes a new assessment after the work has been done, where the original ordinance "has been declared void by a court of competent jurisdiction," such was its intention; and manifestly it was so treated in the present case, for it is on the express assumption that the ordinance of March 28th, 1893, "had been declared *void*" that the new proceedings under this act were instituted. The act provides, (Section 20), "Where, in any case such park board or park authorities having authority to improve any street or streets or parts thereof, and to pay for the improvement thereof by special assessment, and said improvement shall have been made or partly completed, and a special assessment levied therefor shall have been set aside by a court of competent jurisdiction, or the provision in any ordinance for the payment for said improvement by special assessment shall have *failed or been declared void* by any court of competent jurisdiction, then, and in any such case, the said park commissioners or park authorities are hereby vested with power," etc., etc.

The preamble of the ordinance of July 14th, 1896, is in part as follows:

> "Whereas, the said special assessment proceedings in said County Court above mentioned, *and the provisions of said ordinance* for the payment of said improvement, *have been* heretofore, and on the 28th day of March, A. D. 1896, *declared void by the Supreme Court of Illinois*, a court of competent jurisdiction, and the provisions of said ordinance for said special assessment have failed," etc., etc.

It is therefore upon the theory that the ordinance of 1893 had been declared *void* by the Supreme Court of Illinois, and that the work therein contemplated had been already done and completed, that the provisions of the act of 1895 were invoked; and all the subsequent proceedings were conducted thereunder.

Our proposition on this point is, that if the said provision of the act of 1895 conferred any authority whatever in the present case, it was by virtue of its effect as a curative act, and not otherwise. If that act did not cure the defect in the ordinance of March 28th, 1893, then it was never cured, and the act of 1895 could not, under the constitution of Illinois as construed by its courts, justify any assessment for the work previously completed.

See the cases above cited, and also *Pells* v. *City of Paxton*, 176 Ill., 318, from which we quote the following:

> "A city council has no right to make an improvement and then, after the improvement is made, pass an ordinance providing for the making of the improvement. The passage of the ordinance must precede the making of the improvement, *and the making of the improvement and all steps thereafter are absolutely void unless preceded by a valid ordinance.*" (P. 326.)

But we contend:

1. That the defects in the first ordinance were incapable of being cured by a retroactive law, for the legislature had no power to dispense with the vital requirement that a valid ordinance should be the first step, and no retroactive statute can cure omissions which it could not have authorized.

From Cooley on Taxation we quote:

> "One very precise limit to the power to cure these proceedings is this: They cannot be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every

species of legal proceedings. Curative laws may heal irregularities in action, but they cannot cure a want of authority to act at all.

* * * * *

"It is certain that whatever the legislature could not have authorized originally it cannot confirm. The unauthorized acts of individuals cannot confer upon the state a power it did not before possess. Therefore no unconstitutional tax can be confirmed, and none that entirely wants any essential element of taxation." (P. 227.)

From Cooley on Constitutional Limitations, (2d Ed., bottom page 407), we quote:

"The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

From the same volume (bottom page 420):

"But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had no power to permit or sanction in advance."

From the same volume (bottom page 421):

"But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good."

The foregoing rule is well established in this court.

Anderson v. *Santa Anna,* 116 U. S., at pp. 364-365.

St. Joseph Township v. *Rogers,* 16 Wallace (U. S.), at p. 663.

Thomson v. *Lee County,* 3 Wallace (U. S.), at p. 331.

See also,

Folsom v. *Township of Ninety-six,* 59 Fed. Rep., at p. 69.

In Illinois practically the same thing has been held. See *Marsh* v. *Chesnut,* 14 Ill., 223. It was held that a judgment for taxes could not be validated by a subsequent law, where the assessment had not been returned and completed as required by the statute. The same thing was also held in *Billings* v. *Detten,* 15 Ill., 218; *Conway* v. *Cable,* 37 Ill., 82. In the case last cited, the court said that a statute purporting to validate a void tax sale was void as depriving a person of property without due process of law

Since by the constitution of Illinois a *previous* valid ordinance, providing for the assessment, is *essential* to charge private property, and this by the terms of the later ordinance in this case is admitted to have been void, the act of 1895 either did not apply to it at all, or did not effectually aid it.

2. The present is not like those cases in which an equivalent has been received, and a moral obligation exists to make recompense, which in some cases may be enforced by subsequent legislation.

In *New Orleans* v. *Clark,* 95 U. S., 650, this court held that the legislature might, by a new act, (not forbidden by the state constitution), require a city to levy a tax for the payment of bonds, the equivalent of which it had received; but said in the same connection:

> "A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city." (P. 653.)

In the same case the court said:

> "Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the act of annexation."

These plaintiffs in error have received nothing from the park board. It may be assumed that their property is to a degree enhanced in value by the improvement made, but manifestly this is not the kind of a moral obligation which the court considers to justify retroactive statutes. Every public improvement to some degree enhances the value of private property in its vicinity. It is this which little by little adds increment to the value of all city property. Every public highway laid out and paid for or improved by general tax has the same effect. Nearly the entire South Park boulevard system was created and paid for by general tax, but this created no obligation upon the property owner abutting upon it, either legal or moral, to pay for it. The Illinois constitution expressly so provides, as we have seen. The charge upon private property is technical only. Every act of a neighboring private owner which improves property in his vicinity would create the same kind of an obligation.

This was held by the Supreme Court of Missouri not to be the equitable obligation which alone can justify a retrospective statute to enforce it; and it was also held that the rules above cited relating to general taxes had no application.

City of St. Louis v. *Clemens*, 52 Mo., 143.

This element, therefore, may be disregarded.

3. The act of 1895 is not retroactive in any event, so as to make any of the proceedings good *from the begin-*

ning. If it cures any of these defects at all, it does so only *from the date it took effect,* and this would leave the constitutional requirement of a valid *pre-existing* ordinance still lacking.

In *Spencer* v. *Merchant,* 125 U. S., 351, this court held that a statute passed in 1881 to rectify errors in a previous assessment levied under an act of 1869 justified and authorized a new and independent assessment only, and thus became effective only from its date. On this ground alone that proceeding was supported; and it was because of an opinion to the contrary on that subject that two of the judges of this court dissented.

Such was also the decision in the case of *Jones* v. *Tonawanda,* (N. Y. Ct. of Appeals), 53 N. E. Rep., 280.

And in *New Orleans* v. *Clark,* 95 U. S., 655, this court held that the statute requiring a tax to be levied for the payment of a pre-existing obligation, for an equivalent already received, "is not a retroactive law—no more so than an appropriation act providing for the payment of a pre-existing claim."

And the court in the same case said:

> "The constitutional inhibition (forbidding the passage of retroactive statutes) does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

XII.

SUMMARY.

1st. As the court will see, this is a hard case. The controversy arises out of an effort to compel a ribbon of land 125 feet wide, along the margin of a boulevard 250 feet in width, decorated and ornamented as a park, to pay the entire cost of its improvement, although it is made for the general benefit of the inhabitants.

2nd. The original ordinance for the improvement was declared by the Supreme Court, in a direct proceeding, to be *void*, and so utterly without effect as to form no basis for an adjudication thereon by the County Court.

3rd. The constitution and laws of the state, as uniformly construed, permit no such charge to be created against private property without a previous valid ordinance providing that the cost be paid by special assessment or special tax.

4th. The previous assessment having been extinguished completely by the decision of the Supreme Court, there remained no authority of law to charge this property. The legislature thereupon passed a law, after the work had been completed, providing that, notwithstanding the said provisions of the constitution of the state, the work previously completed *might* be charged upon the private property by a procedure therein for the first time provided.

5th. On the application for such an assessment the property owners protested, setting up the provisions of the constitution of the United States in denial of the right.

6th. The courts of the state, although they had held the original ordinance *void,* so as to confer no jurisdiction on the courts even to consider it, held that it was *valid* for the purpose of creating a charge on property of plaintiffs in error.

7th. If the ordinance was in fact valid, then the original judgment of confirmation, reducing this assessment, was valid and effectual, and should have been applied here.

8th. By the whip-sawing process we have referred to the courts of the state have held that the ordinance of March 28th, 1893, was *void,* so as to deprive plaintiffs in error of the benefits of its adjudication reducing the amount of their assessment; but *valid* for the purpose of creating a charge upon their property.

Against this act of judicial discrimination we protest, and appeal to this court for relief, believing that the judgment ought to be reversed.

Respectfully submitted.

JOHN P. WILSON,
WILLIAM B. MCILVAINE,
Counsel for Plaintiffs in Error.

ADDITIONAL ASSIGNMENTS OF ERRORS.

10. The court erred in affirming the judgment of confirmation against the property of plaintiffs in error and of each of them, and inasmuch as the said judgment of confirmation denied plaintiffs in error severally the right to hold their property free from any charge for a public improvement, not made in pursuance of a previously existing valid ordinance, as required by the constitution and laws of the State of Illinois, the judgment of the Supreme Court affirming the said order of confirmation denied plaintiffs in error rights guaranteed to them under the Fourteenth Amendment to the Constitution of the United States.

11. The County Court of Cook County should have dismissed the petition for confirmation of the said assessment on the motion of plaintiffs in error, on the ground that upon its face the record was insufficient, under the constitution and laws of the State of Illinois, to support the said assessment, lacking the preceding valid ordinance required thereby; and also on the further ground that in view of the evidence before the court the said ordinance and other proceedings appeared to be insufficient in law; and the said Supreme Court erred in sustaining said refusal and in holding that the same was correct; and since it appeared upon said trial that the original ordinance for said improvement was invalid, the failure of said trial court to dismiss said petition on said motion, and the affirmance of said decision by the Supreme Court of Illinois, amounted to the imposition of a burden on the property of the plaintiffs in error, without due process of law;

and also to a denial to said plaintiffs in error of the equal protection of the laws.

12. The court erred in holding that the County Court of Cook County had jurisdiction to confirm the assessment appealed from upon the property of the plaintiffs in error and each of them; such judgment imposing said charge on the property of said plaintiffs in error, without having jurisdiction under the laws and constitution of the State of Illinois, lacking a preceding valid ordinance for an assessment therein; and the affirmance of said judgment by the Supreme Court of Illinois, amounted to the imposition of a charge on the property of the plaintiffs in error, without due process of law, and also to a denial of the equal protection of the laws, all in contravention of the Fourteenth Amendment to the Constitution of the United States.

13. The court erred in holding that the property of plaintiffs in error could lawfully be assessed for the said improvement by the ordinance and proceeding shown in the record, originating after the work was done, the original ordinance for the assessment having been void; and inasmuch as the constitution of Illinois forbids such a charge, under such conditions, the said judgment, and the affirmance thereof by the Supreme Court of Illinois, imposed a charge upon the property of plaintiffs in error contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

14. The State court, having held that the original ordinance for said improvement, passed in March, 1893, was insufficient to support a proceeding to confirm an assessment therefor, departed from the requirements of the State laws and constitution in holding that said ordinance

was sufficient to support a proceeding after the work was done based on the new ordinance, passed after completion of the work; said judgment of the trial court had the effect to deny to plaintiffs in error, and each of them, the right to hold their property free from public charges or burdens, except such as are imposed pursuant to the statutes and constitution of the State of Illinois; and amounted to a charge thereon without any authority of law, and therefore denied to the plaintiffs in error, and each of them, the right to due process of law, and to the equal protection of the laws, guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

15. If the court was right in holding that the provision in the ordinance of March, 1893, for a special assessment to pay for said improvement had any validity, then the court should not have denied plaintiffs in error the benefit of the judgment of the June term, 1893, confirming the assessment then before the court; and said judgment of the trial court had the effect to deny to the plaintiffs in error, and each of them, the right to hold their property free from public charges or burdens except such as are imposed pursuant to the statutes and constitution of the State of Illinois; and amounted to a charge thereon of said excess without any authority of law, and therefore denied to the plaintiffs in error, and each of them, the right to due process of law, and the right to the equal protection of the laws, guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

16. As to plaintiff in error Lombard, the court erred in denying him the benefit of his contract with the de-

fendants in error fixing the amount of the assessment on his property, and in refusing to enforce the said contract; the said courts, and each of them, denied said plaintiff in error Lombard the equal protection of the laws, and denied him due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

17. The court erred in holding, in the present case, contrary to the established laws of Illinois, that the new ordinance, passed after the completion of said improvement, was sufficient to justify the proceeding and judgment appealed from, and thereby the State court sought to charge the property of the plaintiffs in error, and each of them, with the public burden in question, without authority of law, and without any statute therefor, except the act approved June 24, A. D. 1895, in force July 1, 1895, purporting to authorize the same, which law was without force or effect for that purpose; and thereby the said courts denied plaintiffs in error, and each of them, the right to the equal protection of the law; and also denied to them severally due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

18. That by the record aforesaid it appears that the judgment aforesaid was given for the said West Chicago Park Commissioners against the said J. L. Lombard *et al.*, whereas by the law of the land the said judgment ought to have been given for the said J. L. Lombard *et al.*, against the said West Chicago Park Commissioners. The constitution and laws of the State of Illinois which were applicable to the case of the plaintiffs in error here were not applied to the present case, either by the trial court or by the Supreme Court of Illinois, but the burden of the

charge complained of was made upon them without any authority of law and without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

19. The State court should not have held the ordinance of March, 1893, valid and sufficient to support the assessment in question, levied after the work had been completed, and at the same time have held the same ordinance invalid and insufficient to support the judgment of the March term, 1893, of the County Court of Cook County, reducing the assessment of plaintiffs in error. The said contradictory decision had the effect to deny these plaintiffs in error, and each of them, due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and also to deny to them the equal protection of the law.

20. By the settled law of Illinois and the established construction of its constitution, the ordinance of March, 1893, was absolutely void at the time the present cause of action arose. The courts of the State of Illinois departed from the settled law of that State in the present case, and attempted to enforce the present charge on the property of plaintiffs in error, contrary thereto, all of which was in contravention of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted.

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